

April 10, 2013

Molly Dwyer
Clerk of the Court
United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
Post Office Box 193939
San Francisco, California 94119-3939

Re: ***Omega S.A. v. Costco Wholesale Corporation***
Ninth Circuit No. 11-57137

Dear Ms. Dwyer:

This letter responds to Costco Wholesale Corporation's March 29, 2013 letter regarding *Kirtsaeng v. John Wiley & Sons, Inc.*, 81 U.S.L.W. 4167 (U.S. Mar. 19, 2013) (No. 11-697).

Omega agrees with Costco that nothing about *Kirtsaeng* "is at issue in Omega's current appeal."

Although Costco acknowledges that *Kirtsaeng* has no bearing on the resolution of this appeal, Costco nevertheless says in passing that *Kirtsaeng* "overrules this Court's" prior decision in *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982 (9th Cir. 2008). But whatever *Kirtsaeng*'s impact may be on cases *other than this one*, *Kirtsaeng* has no impact on this Court's prior determination that "the first sale doctrine is unavailable as a defense to Omega's claims" *in this case*. *Id.* at 983. An equally divided Supreme Court affirmed that judgment. *Costco Wholesale Corp. v. Omega, S.A.*, 131 S.Ct. 565 (2010). It is well-settled that when such a Court of Appeals judgment is affirmed by an equally divided Supreme Court, the judgment is not "authority for other cases of like character[] [b]ut the judgment is *conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case.*" *Durant v. Essex Co.*, 74 U.S. 107, 113 (1868) (emphases added); accord *United States v. Pink*, 315 U.S. 203, 216 (1942) (affirmance by equally divided Supreme Court renders Court of Appeals' judgment

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“conclusive and binding upon the parties *as respects that controversy*” (emphasis added)).

Respectfully submitted,

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By: _____ s/ Barry R. Levy _____

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BRL:rfw
(See attached Certificate of Service.)

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Signature: s/ Robyn F. Whelan